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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted]41

WELLS FARGO & COMPANY, PETITIONER,

vs.

OSCAR G. TAYLOR.

BRIEF FOR RESPONDENT.

PAINE & PAINE,
Solicitors for Respondent.

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Of Counsel.

(26,509)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 112.

WELLS FARGO & CO., PETITIONER,

versus

OSCAR G. TAYLOR.

BRIEF FOR RESPONDENT.

ABSTRACT OF THE CASE.

1.

This case was appealed from the equity side of the docket of the District Court of the United States for the Eastern Division of the Northern District of the State of Mississippi. This was the second time this case had been appealed to Circuit Court of Appeals. The first appeal being reported in 220 Fed. Rep., "796," and 136 C. C. A., page "402."

The history and origin of the litigation is as follows. The appellee was an express messenger or guard traveling for appellant with express matter of appellant between Aberdeen

and Amory, Miss., over the branch railroad line of the St. Louis & San Francisco Railroad Co., which said railroad is hereafter referred to in this brief as the Railroad Co. Appellee received expressage from the main line of the said railroad and delivered expressage to the agents of appellant on the main-line trains of said railroad company. The main line of the railroad extended from Memphis, Tenn., through Tennessee and Mississippi, and into Birmingham, Ala. Appellant handled interstate as well as intrastate shipments and was actually engaged in handling interstate expressage at the time of his injury. That on the 8th day of December, 1909, while appellee was engaged in his work and while riding on the train of the railroad company and in a car furnished by the railroad company for the use of appellant and its agents or employees, and in which car the expressage was being carried, the appellee was injured by the derailment of the car in which he and the expressage was being transported. The derailment of the car was due to the gross negligence of the agents and employees of the railroad company, in the upkeep of the railroad track and the operation of the train, on account of which injury the appellant was permanently injured.

On the 10th day of February, 1910, the appellant sued the railroad company in the State court of Mississippi. Before the trial of the case the appellant made its appearance in the State court by written petition and motion asking the court to be allowed to be made a party defendant with the railroad company and simultaneously the railroad company filed a motion to require the appellee to make the appellant a party defendant. (See record, pages "73-74," affidavit of W. T. Ware, circuit clerk.) Both of these motions were overruled by the State court and no appeal was prosecuted therefrom to the Supreme Court of Mississippi by appellant. (See admission by counsel for appellant, record, page "50.")

After the overruling of this petition and motion, the case proceeded to trial and the railroad company offered in evidence the messenger's agreement, which is the Exhibit "B" to

the bill in this cause. But State court held it void as contrary to public policy of the State. This trial in the State court resulted in a verdict against the railroad company and in favor of the appellee for $4,000.00, the railroad making no defense on the question of their negligence. From this judgment an appeal was taken to the Supreme Court of the State of Mississippi by the railroad company, and was by that court affirmed. The appellant, the Wells Fargo & Co., filed its bill in the U. S. District Court on May 2, 1910, and afterwards was granted a temporary injunction restraining appellee from collecting this judgment until the bill should be finally heard.

The gravemen of the bill was for specific performance of the contract, the messenger's agreement, and that appellee be enjoined from collecting his judgment obtained in the Mississippi courts against the railroad company. The contract which the bill seeks to require the appellee to specifically perform is known in this record as the messenger's agreement or contract, Exhibit "B" to the bill, as appears on pages "23-25" of this record. This contract is to the effect that the appellee, in consideration of his employment by the appellant, would not make claim for injury against the said railroad company or the appellant, in the event he was injured by the appellant or the railroad company, while in the discharge of his duties as express messenger on his line of travel; and this waiver in the contract was binding even though the appellee was injured by the gross negligence of the appellant or the railroad company.

To the original and supplemental bills the appellee demurred on the ground that the bills were without equity, in that Exhibit "B" was void and unenforceable as being contrary to the Employers' Liability Act of the U. S., 35th Statutes at Large, chapter 149, page 55, and amendments, and also because the court had no authority to interfere with the jurisdiction of the State court by enjoining the appellee from proceeding to collect his judgment obtained in the State courts. These demurrers were overruled and appellee

answered and in his answer alleged the same defense and also denied that he signed the contract, Exhibit "B" to the bill. The district court sustained the bill, and from his decree appellee prosecuted his appeal to the circuit court of appeals, in which court a decree was entered reversing and remanding the case, for the reason that the bill was without equity, this court, through Judge Walker, holding that the bill failed to allege that the appellee was not an employee of the railroad company. (See 136 C. C. A., page 402.)

The appellee then filed a motion in the circuit court of appeals requesting the court to modify the decree so as to authorize the district court to allow the appellant to amend his bill in conformity with the decree. This motion was overruled by the circuit court of appeals and the appellant took no appeal therefrom. The appellee then filed its motion in the district court to dismiss the bill and dissolve the injunction, which motion was overruled by the district judge. The district court then, on motion of appellant and over the objection of appellee, permitted the appellant to amend the original and supplemental bills to the effect that the appellee was not an employee of the railroad company but was employed alone by the appellant. To the sustaining of this motion the appellee excepted and preserved his exception as is shown by the record, page "44." Appellee then filed his amended answer and set up the same defenses made on the first answer on the first appeal and other additional defenses not presented on that appeal, all as shown in this answer. (See record, pages 49-53.)

Upon the trial of this cause the district court took the same under advisement and in vacation rendered a decree sustaining the amended bills and perpetually enjoining the appellee from proceeding to enforce the collection of the judgment obtained by the appellee in the State courts, from which decree appellee prosecuted an appeal to the Circuit Court of Appeals, and in the Circuit Court of Appeals a decree was rendered that the bill was without equity and

reversed the case and dismissed the bill (see record, page 60), after which Wells Fargo & Co. obtained certiorari.

BRIEF OF ARGUMENT.

"A."

The bill is without equity, for the reason that the messenger's agreement, Exhibit "B" to the bill, page 23 of the record, upon which the relief in the bill is prayed, is void and unenforceable as violative of the act of Congress April 22nd, 1908, chapter 149, 35th Statutes at Large, page 65, sections 1 and 5 thereof, and amendments, for the reason that the appellant was a common carrier by railroad, handling interstate commerce, at the time appellee was injured, and the appellee was injured while handling interstate commerce, owing to the negligence of the agents, or officers or employees of appellee, to wit, the St. L. & S. F. R. R. Co., or the appellant and the St. L. & S. F. R. R. Co. were partners or coproprietors engaged as common carriers by railroad, handling interstate commerce, and appellee, a joint employee of both, was injured by the negligence of the employees of the railroad company, while handling interstate commerce. In either event, the alleged contract, Exhibit "B," is void, as violative of the above statute.

Bank of Ky. *vs.* Adams Express Co., 93rd U. S., page 174.
B. & O. R. R. Co. *vs.* Voight, 176th U. S., page 498.
Oliver *vs.* N. P. R. R., 196th Fed. Rep., 436.
Malloy *vs.* N. P. R. R. Co., 151st Fed. Rep, 1023.
Hooper *vs.* Wells Fargo & Co., 27th Cal. Rep., 11.
P., B. & W. R. R. R. Co. vs. Schubert, 224th U. S. page 603.
Meehan *vs.* Valentine, 145th U. S., page 611.
Ward *vs.* Thompson, 22nd Howard page 330.
Shumaker on Partnership, page 2.

The case of Robertson *vs.* B. & O. R. R. Co., 222nd U. S., page 506, will be distinguished from the above authorities as not applicable to the facts in the case at bar.

"B."

The decree heretofore by the circuit court of appeals on the first appeal of this case, as appears in 136 C. C. A., page 402, reversing and remanding the cause, was a final decree on the merits of litigation; hence appellant's sole remedy was by appeal by certiorari to the Supreme Court of the United States or for the Circuit Court of Appeals to have reserved a right for the appellant to amend the bill. On reversal the district court was without authority in law or equity to permit the appellant to amend the bill; especially is this so in view of the fact that the Circuit Court of Appeals refused to permit an amendment or to authorize the district court to allow an amendment and appellant took no appeal therefrom, all as appears by a motion of appellant and the decree of the Circuit Court of Appeals thereon. See motion and decree in this court. The district court should have sustained the motion of appellee and dismissed the bill and dissolved the injunction.

Bostwick, rec., *vs.* Brinkerhof, 106th U. S., page 3.

Lodge *vs.* Twell, 135th U. S., page 237.

City of Paducah, Ky., *vs.* East Tenn. Tel. Co., 229th U. S., page 476.

1st vol. Foster's Fed. Practice, page 576, Sec. 1, Note 17.

Am. Bell Telephone Co. *vs.* U. S., 15th C. C. A., 569-597.

Port *et al. vs.* Beacon Vacuum Pump & Elect. Co., 32nd C. C. A., 151-155.

Vessel Abby Dodge *vs.* U. S., 223rd U. S., page 166.

In re Sanford Fork & Tool Co., 160th U. S., page 247.

Foster's Federal Practice, vol. 3, pages 2136-2137-3155.

Mackall *vs.* Richards, 116th U. S., page 145.
Van Doren *vs.* Penn. R. R. Co., 93rd Fed. Rep., page 272.
Preferred Accident In. Co. *vs.* Baker, 88th Fed. Rep., page 814.
Hunt *vs.* Howse, 74th Fed. Rep., page 657.
Hubbard *vs.* Manhattan Tea Co., 87th Fed. Rep., page 51.
Southard *vs.* Russel, 16th Howard, page 547.
Watson vs. Stephens, 53rd Fed. Rep., page 611.
Woodward *vs.* Boston Lasting Mack. Co., 63rd Fed. Rep., page 611.

"C."

The United States district court was without jurisdiction to entertain the bill in this cause, the gravamen of which was to enjoin the collection of a judgment obtained by the appellant in the Supreme Court of the State of Mississippi. This bill as amended sought injunctive relief not as an incident to an existing cause in equity but as the primary object of the State courts first had and obtained; and

because

1st. It is contrary to public policy and the comity of courts for the United States courts to interfere with the jurisdiction of the State courts first had and obtained; and

2nd. It is violative of section 720 of the Revised Statutes of the United States and of section 265, chapter 11, of the Judiciary Act of March 3rd, 1911, of the United States.

Wayman *vs.* Southard, 10th Wheat., page 1.
Leath *vs.* Thomas, 97th Fed. Rep., 136.
Whitney *vs.* Wilder, 54th Fed. Rep., 554.
Mills, sheriff, *vs.* Provident Life & Trust Co., 100th Fed., 334.
Slaughter House Cases, 10th Wallace, 273.

Maloney *vs.* Mass. Loan Ass'n, 53rd Fed., page 209.
Foster's Federal Practice, vol. 1, pages 694-695.
Sargent *vs.* Helton, 115th U. S., page 348.
Moran *vs.* Sturges, 154th U. S., page 268.
Nelson *vs.* Camp, 191st Fed Rep., 712, 16th C. C. A., page 90.
Central Nat'l Bank of Boston *vs.* Stephens, 169th U. S., page 432.
Riggs *vs.* Johnson Co., 6th Wallace, page 166.

"D"

The appellant voluntarily sought the jurisdiction of the State of Mississippi Circuit Court, in the case of Appellee *vs.* The Railroad Co., and having been denied relief by that court did not exhaust its remedy by appeal from that court to the Supreme Court of the State of Mississippi, and did not exhaust its remedies in the State Court, to wit, the chancery court, and is therefore estopped or has waived its rights to proceed with the case in the U. S. district court. The messengers' agreement, page 23 was offered in evidence on the trial of the Appellee *vs.* The Railroad Co., in the State courts and the same was held void, as contrary to public policy, as an effort on the part of the railroad company to relieve itself from liability for its own negligence. This ruling should be binding on the U. S. court, as the appellant sought the jurisdiction of this court and did not exhaust its remedy in the State court.

Harkreader *vs.* Wadley, 172nd U. S., page 148.
Freeman *vs.* Howe, 24th Howard, page 450.
Buck *vs.* Colbath, 3rd Wallace, 334.
Taylor *vs.* Taintor, 16th Wallace, 366.
Joseph Wiswall *vs.* David Sampson, 14th Howard, 52
4th Vol. Federal Statutes Annotated, page 509 *et sequiter* U. S. *vs.* Pedroli, 111 Fed. Rep., 14.
Cavanaugh *et al. vs.* Tooney, 39 S. C. R., 142.

IV.

ARGUMENT.

In our argument we will take up and discuss the preceding propositions, lettered A, B, C, and D, *seriatim*. And we desire to present, first, proposition "A" to wit:

SECTION "A."

Under this division of our brief we argue that the messenger's agreement, Exhibit "B" to the bill, is void and unenforceable as violative of the employers' liability act of 1908, chapter 149, 35th Statutes at Large, page 65, section 5 thereof and amendments, and therefore the district court erred in not sustaining our motion to exclude the evidence of the appellant and to dismiss the bill and dissolve the injunction, which motion appears on pages 1 to 64 of the record; and the circuit court of appeals was correct in reversing the cause and ordering the trial dismissed.

1st.

We contend that the said employers' liability act, *supra*, is broad and comprehensive, and protects and extends to employees of express companies, when such express companies are common carriers of interstate commerce by railroad, and when such employees are engaged in handling said interstate commerce when injured.

2nd.

That if mistaken as to this, that under the contract between the appellant and the railroad company, as set out on pages 14 to 22 of the record, and under the law, the appel-

lant and railroad company were partners or coproprietors and the appellee was a joint employee of both, which being true, the said employers' liability act extends to the appellee and protects him against the messengers' agreement, Exhibit "B" and renders said Exhibit "B" void and unenforceable, and the appellee was not seeking any affirmation relief but merely defending on the ground that the contract is void under the employers' liability act.

We now discuss these two propositions in the order in which we have referred to them.

1st.

Does the employers' liability act of 1908 embrace express companies doing business of a common carrier by railroad and handling interstate commerce?

This question is *nova res* in the courts. We can find no reported case in which this question has been presented to the Supreme Court or the circuit courts of appeal, except the former appeal of this case, wherein Judge Maxey delivered a strong opinion, holding in the affirmative and in favor of our position. We confidently believe this court will give this question its careful attention and believe that the announcement of the court will be an adoption of Judge Maxey's opinion delivered on the former appeal.

The Supreme Court of the United States, in the case of Robertson *vs.* Baltimore & Ohio Railroad Co., 222nd U. S. p. "506," did announce that the employers' liability act did not extend to employees of the Pullman Company, but the case was decided on a different set of facts from the case at bar, and the relation-ship between the railroad company and the Pullman Company, was different from that between the appellant and the express company, in the case at bar, and we will discuss this case later on in our brief.

The language used in section "1" of the employers' liability act is as follows:

> "Every common carrier by railroad while engaged in commerce between the several States and Territories, etc."

It is evident from this language that Congress intended to make the act applicable to express companies or any other transportation company engaged in the business as a *common carrier by railroad;* if Congress had intended to limit the provisions of this act to railroads alone, it would have used the phrase *"Every railroad* doing the business of a common carrier," etc.

But this act uses, with precision and consideration, the adjective "every" as modifying the words "common carrier," which means or relates to more than two, and brings into greater prominence the notion that not one of all considered is accepted. The adjectives "every" and "all" are synonymous. And the use of this adjective clearly shows that Congress meant to include all common carriers by railroad, and should not be delimited to one common carrier by railroad, since Congress recognizes that there are other common carriers by railroad. We submit that if this statute is to be thus delimited by judicial legislation so as only to include railroads doing the business of common carriers, then it would be unconstitutional because it would be imposing liabilities on railroads doing the business of common carriers that are not imposed on other common carriers by railroad, to wit, express companies doing the business of common carriers when said express companies were acting as common carriers by railroad. The statute should be construed so as not to render it unconstitutional.

The evident purpose of Congress in enacting this act was to protect those who were compelled to undergo the hazards of earning their livelihood by working on railroads. And if

employees of express companies which are carrying on business of common carriers by railroad are forced to travel on said railroad and are necessarily subjected to the same dangers and hazards that employees of the railroad are subjected to, then certainly Congress intended this act to embrace such employees and to protect them from their improvident contract. And Congress evidenced its clear intent by employing the words "*every common carrier* by railroad," etc.

Judge Hughes in his opinion in the case of P., B. & W. R. R. Co. *vs.* Schubert, 224th U. S., page 603, in analyzing this act says:

> "And so when Congress decided to protect the safety of employees by establishing rules of liability *of carriers* by injuries sustained in the course of their service, it may make the rules uniformly effective."

We refrain from instancing the evils that would inevitably flow from a different interpretation of this act. Because we should know this court will readily apprehend them. We ask why should Congress enact a law, even if they have the constitutional right to do so, protecting alone the employees of railroad corporations doing the business of common carriers, and leave unprotected employees of express companies, engaged as common carriers by railroad, when said employees of the express companies ride on railroads and are subjected to the same dangers and hazards as the employees of railroads?

Was the appellant at the time of the injury to appellee a common carrier by railroad handling interstate commerce? It is admitted by the appellant that at the time of the injury that it was engaged in interstate and intrastate commerce as a common carrier. (See record, middle of page 47.) The appellant has been adjudged a common carrier by the Supreme Court of the United States in the case of Bank of Kentucky *vs.* Adams Express Co., 93rd U. S., page 174.

This case has been cited and approved in numerous subsequent decisions by the Supreme Court, and in none of them has this adjudication, that an express company was a common carrier, been repudiated or even questioned. See Western Union Tel. Co. *vs.* Call Pub. Co., 181 U. S., page 92; Express Co. *vs.* Croninger, 226th U. S., page 491; Express Co. *vs.* U. S., 212th U. S., page 522.

But, on the contrary, this adjudicated designation of express companies as common carriers is the legal name used in subsequent acts of Congress in classifying express companies. Under these authorities there can be no question but that express companies are common carriers in the United States. They are common carriers by steamboat, steamship, stage coach, railroad, or any other mode of transportation necessary for the carrying on of its business. We submit that in the case at bar the appellant was a common carrier by railroad, because at the time of the injury the appellant was transporting its expressage and messengers by railroad.

It is admitted by the bill that appellee was in the employ of the appellant at the time of the injury and the record discloses the fact, which is not disputed by counsel for appellant, that at the time of the injury appellee was engaged in handling interstate commerce.

We submit the conclusion that if the employers' liability act extends to embrace express companies by railroad, then the appellee can plead that the Exhibit "B" is void, since the appellant was engaged in interstate commerce as a common carrier by railroad and appellee was injured while employed by said common carrier by railroad so engaged and while handling interstate commerce, and Exhibit "B" is therefore void as contrary to section 5 of said employers' liability act.

2nd.

Was the appellee an employee of the railroad company when injured, and were the appellant and the railroad com-

pany partners or coproprietors at the time appellee was injured?

Under Exhibit "A" to the bill, which is the contract between the appellant and the railroad company, we argue that appellee was an employee of the railroad company at the time of the injury. And we base this assertion on the case of B. & O. R. R. Co. *vs.* Voight, 176th U. S., page 498. Quoting from the language of Justice Shiras, who delivered the opinion in the above-cited case, as follows:

> "The relation of a express messenger to the transportion company, in cases like the present one seems to us to more nearly resemble that of an employee than that of a passenger. His position is one created by agreement between the express company and the railroad company, adjusting the terms of a joint business company, the transportation and delivery of express matter; his duties of personal control in custody of the goods and packages if not performed by an express messenger would have to be performed by some one in the immediate service of the railroad company. And of course if his position was that of a common employee of both companies he could not recover for injuries that were caused, as would appear to have been the present case, by the negligence of a fellow servant."

We also insist that the railroad company in this case, to wit, the St. L. & S. F. R. R. Co., was the agent or the employee or a partner or coproprietor with the appellant. And since the appellee was injured by this agent, or employee or partner or co-proprietor of the appellant, he has the right to claim that his employment fals within the employers' liability act, and that therefore this alleged messengers' agreement is void and unenforceable.

See Oliver *vs.* N. P. R. R. Co., 196th Fed., page 432; Mallory *vs.* N. P. R. R. Co., 151st Fed., page 1023.

In the case of the Bank of Ky. *vs.* Express Co., 93rd U. S., page 174, railroad companies hauling express companies are held to be the agents of the express companies. This last case, *supra*, directly sustains the argument that in the case at bar the railroad company was the agent of the appellant and therefore the appellee was injured by the agent of the appellant and the contract, "Exhibit B," falls within the condemnation of section 5 of employers' liability act; in which section it is enacted "that if the employee is injured by the negligence of the employee, officers or agents of the common carrier, that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

See also Hooper *vs.* Wells Fargo & Co., 27th Cal., page 11.

If the railroad company was not an employee or agent or partner of the appellant, what was the relationship? In the Voight case, *supra*, the court held that it was more nearly akin to the relationship of partners, and further held that the express messenger was a employee of the railroad company. This seems to be the better reasoning. Appellee was on the train of the railroad company at the time of his injury, subject to the same dangers and hazards as any other employee of the railroad company and was surely not a trespasser, nor was he a licensee, nor was he a passenger; he must, therefore, have been on the train as an employee of the railroad company or the railroad company was the agent or employee of the appellant; in which latter event the appellee would have been a co-employee of the railroad employees.

Were the railroad company and the express company in the case at bar partners or co-proprietors? If a construction of the contract shows they were partners then necessarily appellee was an employee of the railroad company as well as an employee of the appellant, and would have the right

to plead the messenger's agreement was void under the employers' liability act, regardless of the question as to whether or not this act applies to employees of express companies.

But if the appellant and the railroad company were partners or co-proprietors at the time of the injury, then unquestionably appellee could seek protection under this act as he was injured by the employees of the railroad company, and while engaged in handling interstate commerce. What, then, is a partnership? In the language in the opinion in the case of Meehan *vs.* Valentine, 145th U. S., page 611, and Ward *vs.* Thompson, 22nd Howard, page 330, and also Shumaker on Partnerships, page 2, we are informed that where parties contribute money or property to carry on a joint business for their common benefit and share in the profits that they are partners. Under the contract, Exhibit "A" to the bill in this case, it is shown that both parties, the railroad company and the appellant, contributed property to carry on a joint business and this business was for their common interest and both shared in the profits. The railroad company furnished cars, furnished heat and light, locomotion, space in their stations, hauled the wagons and horses of appellant, and contributed other property and rights; in return for all of which the railroad company was to get 55 per cent. of the gross profits from this express business, never to be less than $85.00 per mile. This contract, Exhibit "A," clearly indicates that it was a partnership transaction, called by a different name. The Exhibit "A" is the same kind of a contract that was had between Wells Fargo Co. and the Baltimore and Ohio R. R. Co., which was construed in the case of B. & O. R. R. Co. *vs.* Voight, 176th U. S., page 498, in which case the court, in construing this contract, said:

> "Our citations have been intended partially to disclose in a succinct form the nature of the express business; but more particularly in essense the express business is one that requires the participation of both

companies agreed upon in special contracts, thus creating to a certain extent a sort of partnership relation between them in carrying on a common carrier business."

The court held that they were carrying on a joint business, which created to a certain extent a partnership relation. Under this decision and the facts in the case at bar we have the appellant and the railroad company both furnishing and contributing property to carry on a joint business for their common benefit and both sharing in the profits; all the essential elements necessary to constitute a partnership. The facts in the case at bar and the contracts between the appellant and the railroad company show that they were either partners or co-operators, placing this case at bar in the same class as that of Oliver *vs.* The N. P. R. R. Co., 195th Fed. Rep., page 432, in which case the porter on the sleeping-car was held to be a joint employee of the sleeping-car company and the railroad company, and the court decided that he could plead the voidness of his contract as violating the federal employers' liability act.

The case at bar is clearly distinguished from the case of Robinson *vs.* B. & O. R. R. Co., 222nd U. S., page 506.

In the Robinson case, *supra,* there was no question raised as to this point; and the facts in that case and the contract showed clearly that the Pullman Company and the railroad were not partners or co-proprietors. In the Robinson case the railroad company did not contribute any property for the purpose of carrying on the business; it merely hauled the cars of the Pullman Company. A reading of these contracts will show clearly the difference in the relations of the railroad companies in the one case to the Pullman Company and in the case at bar to the express company. In the case at bar the evidence shows that the railroad company furnished parts of its station-houses, and furnished space in its cars, and

made other contributions of property to carry on the partnership business. The contract between the appellant and the railroad company also discloses the fact that the appellant had the right to use any employee of the railroad company as its employee. None of these facts appear to have been a part of the contract in the Robinson case. In the case at bar after the railroad company had furnished to the joint business or to the partnership business all these contributions of property and service, under the contract the railroad was to share in the profits to the extent of 55 per cent of the gross earnings derived from the express business on the lines mentioned therein. (See record, page 17, section 7 of the Exhibit A.") And on page 19 of the record this same contract shows that the express company and the railroad company were to have an annual accounting.

Where there is any partnership arrangement between two masters, wherein a servant is employed for the common business of both, the servant of either master will become fellow servants. McKinney, on Fellow Servants, page 46; R. R. Co. *vs.* Schneider, 45th Ohio State, page 678; Swainson *vs.* R. R., L. R., 3rd Exch. Div., 341.

Employment and payment of a person *are not* indispensable elements to create the relation of master and servant. D. & R. G. R. R. Co. *vs.* Gustafson, 21st Col., page 393; Gaines *vs.* Bard, 57th Ark., page 615.

We contend that under the contract, Exhibit "A" in this case, wherein the railroad company furnished property to carry on a joint business for the common benefit of the railroad and the express company, and wherein the railroad company shared in the profits, which said business was interstate commerce, for the mutual, financial benefit and advantage of the railroad company and the express company, brings the operation of the car and appellee, performing services in said car, within the meaning of the employers' liability act.

This court will observe that the circuit court of appeals in rendering the decree, from which the record was certioraried to this court, pretermitted all the assignments of error presented by the present appellee, except that assignment of error embodied in the preceding section of our brief; and that court in reversing the case and ordering the bill dismissed only considered the question argued in the preceding section of our brief, towit, the application of the employers' liability act to the appellee under the facts in the case.

But we respectfully submit that even though this court may hold that the circuit court of appeals was in error as to this question of law, yet the circuit court of appeals should be affirmed because of the other meritorious assignment of errors presented by the present appellee to that court; which said errors of the district court were not considered and passed on by that court. And if there is merit in the other assignment of errors as presented to that court, then the action of the circuit court of appeals should be sustained in reversing the case and ordering the bill dismissed. And we desire to discuss those other questions pretermitted by the circuit court of appeals, as set out in our brief under the sections "B," "C," and "D."

The decree rendered heretofore on the first appeal, as reported in 220 Fed. Rep., page 796, 136 C. C. A., page 402, was a final decree on the merits of the litigation, and the trial court was without authority to permit the appellant to amend the bills after the reversal and remanding of the cause; and after the circuit court of appeals refused to permit the appellant to amend or refused to authorize the district to allow an amendment, or refused to reserve a right for the appellant to amend, the sole remedy of appellant was by appeal to the Supreme Court of the United States. The lower court erred in permitting this amendment by appel-

lant and erred in overruling the motion of appellant to dismiss the bill and dissolve the injunction.

The district court should have sustained the motion of appellant, because the decree of the circuit court of appeals in No. 2716, its docket, was a final decree on the merits of the cause. A final decree is a decree which settles the equities of the case. The court will observe from reading the opinion of Judge Walker, in No. 2716, the first appeal of this case, that the cause was reversed and remanded for the reason that there was no equity in the bill. The cause was reversed and remanded without any instructions as to the allowance of any further proceedings in the case by the district court.

Under this decree the district court was powerless to take any action and should have sustained the motion of appellee and dismissed the bill and dissolved the injunction. To permit the bill to have been amended was tantamount to the filing of a new bill. Was this decree final?

Chief Justice Waite, in the case of Bostwick, Rec., Brinkerhof, 105th U. S., page 3, defines a final decree "As a decree terminating the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the circuit court below would have nothing to do but to execute the judgment or decree it had already rendered." And further in the opinion the same judge says:

> "If the judgment is not one which disposes of the whole case on its merits, it is not final."

Under these definitions and rules we submit that when the circuit court of Appeals on the first appeal of this case, No. 2716, decreed there was no equity in the bill, that was a disposal of the whole case on its merits and was final.

The court will thus apprehend from a reading of the opinion of Judge Walker that the circuit court of appeals reversed and remanded this cause and gave no further or additional directions for further proceedings under its de-

cree; but simply and plainly, in the language of the decree, "reversed and remanded the cause," because there was no equity in the bill, thus fully and finally disposing of the case on its merits. That court in so many words said there is no merit in the bill because no equity. Again, Justice Waite, in 105th U. S., page 429, in the case of Grant *vs.* Phœnix Life Insurance Co., defined a final decree, as he had previously defined it in the case of Bostwick *vs.* Brinkerhof, *supra*. And in the case of Lodge *vs.* Twell, 135th U. S., page 237, Justic Fuller defined what was a final decree, using the language of Justice Waite in the case of Daines *vs.* Kendall, 119th U. S., page 54, and the case of Bostwick *vs.* Brinkerhof, *supra*.

By applying these decisions to the decree in the case at bar the conclusion is inevitable that the decree of the circuit court of appeals was a final decree. The circuit court of appeals said there was no equity in the case, and necessarily reversed and remanded the case; not for any further proceedings in the nature of adding amendments, but for the purpose of having the district court to proceed in conformity with its decree, to wit, to dissolve the injunction and dismiss the bill.

The idea that after this final decree has been entered by the circuit court of appeals that the appellant could by amendment or by supplemental proceedings revise the case, is contrary to the procedure under the judiciary act and destructive of the rights of the appellee. To permit an amendment after final decree, where such a right to amend was not reserved by the circuit court of appeals, would enable the district court to breathe the breath of life into every case that the circuit court of appeals pronounced dead. The district court could not open the case after it had been remanded, unless permission had been granted in the decree and mandate of the appellate court. The district court could not in any way modify the judgment of the higher court and possessed no judicial function to exercise in this

matter; it could not exercise any discretion; all that the district court could do was to execute the judgment of the appellate court, which was merely a ministerial act. The judgment was final for the purpose of having the case reviewed by the supreme court, which court could alone terminate the litigation between the parties on the merits of the case when it reached that court; in order that the lower court might execute its old judgment upon affirmance by the supreme court.

Judge Lurton, in his opinion in the case of City of Paducah *vs.* East. Tenn. Tel Co., 229th U. S., page 476, says that the test of finality for the purpose of review by the supreme court on appeal is the face of the decree appealed from. On the reversal and remanding of this cause on its former appeal, suppose the appellant had not made its motion in the district court to amend; then what could the district court have done under this mandate? The answer is the only thing would have been to have dissolved the injunction and dismissed the bill. If this be true, then the decree of the circuit court of appeals was final, and the appellant should have appealed to the Supreme Court of the United States. The only right that was left to appellant, after the former decree in the circuit court of appeals, if it had any, was either to have appealed to the Supreme Court or to have filed a new bill. It could not patch up the old bill by amendment until after the circuit court of appeals had granted the motion or sustained the motion of the appellant, reserving to appellant the right to amend, which the circuit court of appeals refused to do.

It is very evident counsel for the appellant appreciated the fact that the district court had no right to allow amendments afer the decree was entered on the former appeal, because immediately after the decree was entered in No. 2716, in the circuit court of appeals, the appellant petitioned the circut court of appeals to grant it a rehearing, or if denied this that the decree be so modified as to expressly

authorize the appellant to make an amendment to its bills in the district court in conformity with the decree of the circuit court of appeals.

Why was the petition denied by this court as to the allowance of the amendment? It was done because the circuit court of appeals had decreed that there was no equity in the bill and consequently the bill should have been dismissed and injunction dissolved; and it was remanded to the district court so that the lower court could dissolve the injunction and dismiss the bill and protect the appellee by decree for any damages sustained by the wrongful suing out of the injunction.

The decree of the circuit court of appeals being final the appellant's only remedy was an appeal by the proper proceeding to the supreme court. Section 6 of the judiciary act says:

> "In all cases made final there shall be of right an appeal or writ of error or review of the case by the supreme court, etc."

Section 10 of the judiciary act says:

> "Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in which the circuit court of appeals is final, such cause shall be remanded to the district court for further proceedings to be taken in pursuance of such determination."

We ask what was the determination of the circuit court of appeals on the former appeal of this cause? It was this; that there was no equity in the bill or, in the language of Judge Walker, "the bill is to be regarded as one which fails to show that the plaintiff is entitled to the relief prayed and that the court was in error in the decree rendered thereon."

Thus putting an end to any subsequent experiments with

the court in the case by amendments. If the appellant was not satisfied by that decree it had the right to appeal to the supreme court and have the case reviewed and by not doing so it accepted the decree as the law and had no legal or equitable right to ask to have the bill changed by amendment.

Did the appellant have the right to amend the bill in the district court? Certainly not, because and if for no other reason, this court, the circuit court of appeals, refused to grant its petition to specifically instruct the district court to allow it to amend its bill or to reserve a right to amend.

It is said by Mr. Foster in his work on "Federal Practice" 4th edition, volume 1, bottom of pages 575 and 576, and note 17, as follows:

> "That an amendment may be allowed by the court at any time and even after final decree and after decision."

But says this writer:

> "In the *latter case ordinarily* leave from the appellate court to apply for the amendment must be obtained, and only will this amendment be allowed when it is reversed and the cause remanded for further proceedings."

In the case at bar no leave was granted for further proceedings because the circuit court of appeals in reversing and remanding did not grant this right, and on application of appellant, overruled this motion to allow an amendment.

Also see Am. Bell Telephone Co. *vs.* U. S., 15th C. C. A., pages 569-597; Post *et al. vs.* Beacon Vac. Pump & Elec. Co., 32nd C. C. A., pages 151-155; Watson *vs.* Stephens, 53rd Jud. Rep., page 31.

In the first case cited *supra*, the Am. Bell Tel. Co. *vs.* U. S., the United States had filed a bill to cancel certain

patents, etc. The American Bell Telephone Co. answered. On the trial the district court sustained the bill on all points. On appeal by the American Bell Telephone Co., and before the appeal was heard, the United States filed a motion in the C. C. A., that in case the C. C. A. found for the appellant, that it would reserve leave to the district court to permit an amendment by the United States to its bill setting up certain additional facts. But the circuit court of appeals, in reversing and remanding the case, said:

> "To grant this motion would under the circumstances violate all rules requiring diligence from parties complainant."

And the court refused to grant this amendment or to give the district court the right to permit the amendment.

The circuit court of appeals having refused to permit the amendment or to reserve a right to amend, the appellant's sole remedy was by appeal; so that if there was error in the opinion of the circuit court of appeals, the United States Supreme Court could correct the same, as it often does in reversing the circuit courts of appeal. The supreme court, if it had desired, could have directed the district court to permit an amendment, as was done in the case of the Vessel Abby Dodge *vs.* United States, 223rd U. S., page 165, in which case the supreme court, in reversing it, said that the United States would be allowed to make the necessary amendments to give the court jurisdiction.

In the case at bar the appellant prepared its case and submitted the same to the circuit court of appeals and having failed to state a case, as decided by the circuit court of appeals, and then after reversal by the circuit court of appeals, it moved the district court to be allowed to amend the bills, this being done after the circuit court of appeals had refused to authorize the amendment. As appears from this record the district court granted this motion of appellant, which in our

opinion was error, because the district court usurped the express authority given the circuit court of appeals by the judiciary act. As was said by Justice Gray in the case *In re* Sanford Fork & Tool Co., 160th U. S., page 247:

> "Where a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party."

The case at bar was heard on bills, answer, and proof, and was down for final hearing. The decree rendered on the first appeal by the circuit court of appeals was a final decree. The circuit court of appeals was the only court which could have allowed the amendment, unless appealed to the Supreme Court.

See Foster's "Federal Practice," 4th edition, vol. III, pages 2136-2137, and especially page 2133, in which authority this author supports his text by many Supreme Court decisions of the United States to the effect—

> "That when in a decree against a plaintiff the appellate court is of the opinion that the facts show that the plaintiff has an equitable title to some relief, although not to any relief upon the case made by the bill, the decree may be reversed with directions for the allowance to amend."

By an examination of these authorities the court will observe that the District Court of Mississippi had no authority to permit or allow the amendment asked for by appellee.

See Mackall *vs.* Richards, 116th U. S., page 145, in which case Justice Waite says:

> "A motion was made in the court below, after mandate was received for leave to file a supplemental bill, setting up new defenses growing out of matters occurring after the original decree."

This judge held the motion was properly denied because there was no discretion left in that court to grant such a motion.

Under section 10 of the judiciary act, *supra*, it is stated:

> "In a case in which the decision in the circuit court of appeals is final, such cause shall be remanded to the district court for further proceedings to be taken in pursuance of said determination."

The notes to this quotation, section 10, as appears in the work 4th Federal Statutes Annotated, page 428, is as follows:

> "Under this provision the circuit court of appeals like that possessed by the Supreme Court has power to reverse the judgment below and permit the plaintiff to apply to it for the allowance of an amendment."

See also the following authorities: Van Doren *vs.* Penn. R. R. Co., 93rd Fed., p. 272; Preferred Accident In. Co., *vs.* Baker, 88th Fed., p. 814; Hunt *vs.* Howes, 74th Fed., p. 657; Hubbard *vs.* Manhattan Tea Co., 87th Fed., p. 51.

As the circuit court of appeals alone possessed the right to allow the amendment, this right should not have been exercised by the district court.

As persuasive and in support of this argument we presume to call the court's attention to the law that even a bill of review will not lie in a case of newly discovered evidence where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court or permission given by the appellant court to file such bill of review. And we cite one case, to wit: Southard *vs.* Russell, 16th How., page 547, in which case the court says:

> "Nor will a bill of review lie in the case of newly discovered evidence after the publication of the de-

> cree below where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords in England, and we think it is founded on principles essential to the proper administration of the law and to a reasonable termination of litigation between parties in chancery suits."

In our opinion there can be no question as to the right of the circuit court of appeals to grant leave to a complainant to file a motion asking that he be allowed to amend his bill in the lower court. This being true, its refusal to do so is reviewable by the Supreme Court of the United States. Upon its refusal to grant such a motion, the party making the motion must either appeal to the Supreme Court of the United States and obtain a reversal of the decision of the circuit court of appeals or abide by the decree of the circuit court of appeals in overruling its motion. We find from a careful examination of the authorities that the Supreme Court of the United States has frequently reversed the decision of the circuit court of appeals on motions of this nature, and we assume this to be sufficient to conclusively demonstrate that upon the denial of appellant's motion by the circuit court of appeals in No. 2716, on the former appeal, there was but one remedy left to appellant, and that was an appeal to the Supreme Court of the United States.

In concluding this section of our brief we respectfully submit that the district court erred, after the reversal of this cause, in overruling the motion of appellee to dismiss the bill and erred in sustaining the motion of appellant and in permitting it to amend the bills. To the initial this part of our brief is prolix and academic; our excuse for it is that the principles involved in it go to make up a part of the warp and woof of the incomparable system of our Federal practice

and procedure; the study of which has so deeply impressed us that we could not refrain from expressing our conviction and insisting upon the correctness of our position.

C.

The United States court was without jurisdiction to entertain the bill in this cause, the gravamen of which was to enjoin the collection of a judgment obtained by the appellant in the Supreme Court of Mississippi, because it is contrary to public policy and violative of section 720, Revised Statutes of the United States and of section 265, chapter 11, of the Judiciary Act of March 3rd, 1911.

The motion made by the appellee at the close of the testimony of the appellant in the district court should have ben sustained for another reason, to wit; because the court was without jurisdiction to grant the injunction, and also because the bill was without equity on its face. This discussion, therefore, properly falls under two general heads: 1st, the district court cannot enjoin the collection of a judgment obtained in the State courts because it would be in violation of section 720 of the Revised Statutes of the United States; and 2nd, because it would be a violation of the comity of courts.

1st.

It appears that the district court, on July 12, 1912 after the appelle had recovered a judgment in the Circuit Court of Monroe County, Miss., against the railroad company, and after the judgment had been affirmed by the Supreme Court of Mississippi, granted a temporary injunction restraining the appellee, his agents, attorneys, and all other parties to desist from attempting to collect any judgment he may have obtained against the railroad company in the Circuit

Court of Monroe County, Miss., which judgment was affirmed in the Supreme Court of Mississippi. Again on the 30th Sept., 1914, the temporary injunction was made perpetual. (See decree and writ in the record on the first appeal.) The court is now presented with the fact that the appellee has been perpetually enjoined from collecting his judgment obtained in the State courts of Mississippi. This, we submit, was error on the part of the district court, and the motion of appellee should have been sustained.

Section 720 of the Revised Statutes of the United States is:

> "That the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State; except in cases where such injunction may be authorized by any law relating to bankruptcy."

It may be argued in this court by appellant, as it was in the lower court, that this statute does not prohibit an injunction to stay the collection of a judgment, since the proceedings in the State court ended when the judgment was rendered. We submit that this argument is erroneous. It has been held in a number of cases in the circuit court of appeals and also in the Supreme Court of the United States that the jurisdiction of the State courts is not exhausted by the rendition of the judgment but continues until the judgment shall be satisfied. We refer the court to the following authorities in support of this statement, to wit:

Central Bank of Boston *vs.* Stephens, 169 U. S., page 432.

Wayman *vs.* Southard, 10th Wheat., page 1.

Leathe *vs.* Thomas, 97th Fed., page 136, 7th C. C. A.

We quote the following from the case of Leathe *vs.* Thomas, *supra*, as follows, to wit:

> "It is contended that the restraining order does not stay any proceedings in the State court and that its

only purpose is to control the action of a ministerial officer. It is conceded that no court of the United States can lawfully issue any order of injunction to arrest the progress of the suit pending in any court of a State, but it is claimed that this is not a suit pending in a court of a State, inasmuch as the matter has passed into a judgment, and that the issuance of the execution by the clerk and the act of the sheriff in executing it are to be performed under the mandate of the statute, and form no part of the proceeding of the court. This contention cannot be maintained. The prohibition of the statute does not extend to proceedings in a court of a State up to and including final judgment only, but to the entire proceedings, from the commencement of the suit until the execution issued on the judgment or decree is satisfied."

But counsel may argue, as they have heretofore, that section 720, R. S., applies only where the injunction is sought by parties or privies to the proceeding in the State court, and that the appellant in this cause was not a party or a privy to the case in the State court of Appellant *vs.* The R. R. Co., but this argument is also unsound. The prohibition of this section of the Revised Statutes is general and applies not only to parties and privies, but to all persons. (See Whitney *vs.* Wilder, 45th Fed., page 554.) This case is from the fifth circuit. (Also see Mills, sheriff, *et al, vs.* Provident Life Ins. Co., 100th Fed., page 334, from the 9th circuit.)

We quote from the last-cited case as follows, to wit:

"There is nothing in the language of section 720 of the Revised Statutes nor in the reason for the enactment limiting its provisions to parties and privies to the proceeding in the State court, but the prohibition is general and denies to every Federal

> court the right to stay by injunction, at the suit of any person, proceedings in any court of the State, with an exception within which the present case does not come."

This section applies to the Supreme Court as well as to the circuit court. See Slaughter House cases, 10th Wallace (U. S.), page 273.

This court will bear in mind that this case is an action for injunctive relief, not as an incident to an existing cause of action in equity, but as the primary object of the action. If the injunction perpetually restraining the appellee from collecting this judgment is denied the appellant, then the bill necessarilly fails. In other words, the gravamen of the bill is for injunctive relief and this is recognized by Judge Walker in deciding the case on the former appeal. Where a bill prays for injunctive relief or a stay proceedings against the proceedings in a State court and also other relief which would be useless without said injunction, the whole bill is without equity and under the old rule would have been dismissed on demurrer.

Maloney *vs.* Mass. Loan Ass'n, 53rd Fed., page 209.
Foster's Federal Practice, vol. 1, pages 694-695; 4th edition.
Sargent *vs.* Helton, 115th U. S., page 348.
Riggs *vs.* Johnson Co., 6th Wallace, page 166.

We believe that under these authorities this court ought to sustain our contention and the circuit court of appeals was correct in reversing the cause and ordering the bill dismissed, regardless of whether the appellee is protected under the Employers' Liability Act or not.

Not only was this motion well taken, as shown by the preceeding authorities, but we also contend that on account of the comity of courts this court will be compelled to affirm the circuit court of appeals, because to sustain the

action of the district court in granting the injunction would be an interference with the jurisdiction of the State courts first had and obtained in the case of the Appellee *vs.* The R. R. Co.

The appellee sued the railroad company and obtained a judgment against it, which judgment was affirmed by the Supreme Court of Mississippi. The very contract and messenger's agreement, which is the basis of appellee's suit in this court, was offered in evidence by the railroad company in the State court as a defense to appellant's case. The State court held that the contract and messenger's agreement, Exhibit "B," was no defense to the appellee's suit against the railroad company; that the messenger's agreement was void as against public policy. The appellee thus has a valid judgment in the case, in which the very basis of the appellant's suit was held worthless and void and non-enforceable.

How could the district court enjoin appellee from collecting his valid judgment against the railroad company? The State courts and the United States courts have concurrent jurisdiction of this class of cases and this particular case. The State court first obtained jurisdiction and rendered judgment. The comity existing between courts of concurrent jurisdiction should be sufficient to bar appellant of any right to injunctive relief and should compel this court to remand the cause and dismiss the bill. As was well said by the court in the case of Leathe *vs.* Thomas, 97th Fed., page 136:

> "This section above cited (referring to sec. 720 of the Revised Statutes) is not the only obstacle which prevents the sustaining of the order of injunction. The principle of comity which obtains between courts of concurrent jurisdiction forms a recognized part of their duty. It requires that a subject-matter drawn and remaining within the cognizance of a court of general jurisdiction shall not be drawn into con-

troversy or litigated in another court of concurrent jurisdiction. This principle prevails in all courts of concurrent jurisdiction deriving their powers from a common source. 'A departure from this rule would lead to the utmost confusion and to endless strife between courts deriving their power from the same source; but how much more disastrous would be the consequence of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources? Buck *vs.* Colbath, 3rd Wallace, 334-341.' It is firmly established that the application of this principle forbids the courts of the States from interfering, by injunction or otherwise, with the mesne or final process of the courts of the United States; and the same principle, in like manner, forbids the courts of the United States from interfering, by injunction or otherwise, with the mesne or final process of the courts of the States."

We also call the court's attention to the cases of:
Morgan *vs.* Sturges, 154th U. S., page 268.
Whitney *vs.* Wilder *et al.*, 54th Fed., page 554.

This last case *supra* was decided by the fifth circuit, and the judge delivering the opinion in that case said:

"It was said by this court, in the case of Railway Co. *vs.* Kuteman, 54th Fed. Rep., page 547, that there is not in our system anything so unseemly as rivalry and contention between the courts of the State and the courts of the United States. The framers of our statute laws, foreseeing the evils of such conflicting jurisdiction, have wisely prohibited in express terms the granting of injunctions to stay proceedings in any court of a State. (R. S., Sec. 720). This prohibition of the statute extends to all cases over

which the State courts first obtained jurisdiction, and applies not only to injunctions aimed at the State court itself, but also, to injunctions issued to parties before the court, its officers or litigants therein, Diggs *vs.* Wolcott, 4th Cranch, 179; Peck *vs.* Jenness, 7th Howard, 625; Dial *vs.* Reynolds, 96th U. S., page 340."

We also call the court's attention to the case of Mills *vs.* Provident Life & Trust Co., 100th Fed., 136; Nelson *vs.* Camp, 191st Fed., 712; 16th C. C. A., page 90.

3rd.

There are only two exceptions authorizing the United States courts to grant injunctions to prevent a party from collecting a judgment obtained in a State court; one is where the judgment has been obtained by fraud; the other is where the injunction is necessary for the exercise of the jurisdiction of the Federal court and agreeable to the usages and principles of law. The exception dealing with proceedings in bankruptcy is not discussed as not involved in this litigation.

Was there any fraud on the part of appellee in obtaining the judgment against the railroad company? But before we enter a discussion of the facts in answer to this question, we desire to call the court's attention to the fact that before the United States court will issue injunctions to stop the collection of judgments obtained in State courts, it must be established and shown that there was actual fraud in fact in obtaining the judgment. There must be fraud in fact, such as the suppression of certain material evidence or the use of false evidence, and there has never been an adjudicated case wherein it was held to be fraud for a party to sue and recover a judgment in a State court when the entire proceeding leading up and including the

judgment has been approved by the trial and the Supreme Court, and when as a matter of fact no wrong or fraud has been committed by the party suing, as in the instant case.

There can be no fraud where there is no wrong, and fraud cannot be deduced or inferred from that which the law pronounces legal and honest; nor can it be predicated upon acts which the party charged had a right by law to do, provided he pursues such right by lawful means. The record in this case shows there was no fraud in obtaining the judgment in the Supreme Court of the State of Mississippi, or in the trial court. The case was regularly and legally tried in the State courts, and under the State law the judgment obtaining in the trial court was affirmed on appeal by the Supreme Court of Mississippi.

See 58th Southern Reporter, page 485; St. L. & S. F. R. R. Co. *vs.* O. G. Taylor.

The judgment was regular in all respects, and under the law of the State of Mississippi, the contract, Exhibit "B," which is the basis of appellant's suit, was held to be void and not a bar to the appellee's right to recover damages for an injury done him by the railroad company. The contract was held void by the Mississippi Supreme Court and a judgment rendered for appellant, not because he had fraudulently violated the contract, Exhibit "B," not because of any fraud in obtaining the judgment, but primarily because the contract was void as against the public policy of the State of Mississippi. Refer to I. C. R. R. Co. *vs.* Harris, 108th Miss., page 574.

Appellee did not obtain the judgment by fraudulently violating the contract Exhibit "B," because the State courts held there was no contract, stating that the contract, Exhibit "B," was a contract contrary to public policy, and void.

We respectfully submit that rights and judgment of State courts should not be frittered away and set aside by a

Federal court, because the litigants in the State courts neglected and failed to assert their rights according to the State laws. The appellant had its day in court and it chose not to pursue its full and adequate remedy under the law. And now having lost, we submit that it ought not to be allowed, on the mere assertion of fraud, without an iota of proof of fraud in obtaining the judgment, invoke the aid of the U. S. courts by injunction to set aside and annul the solemn judgments of the courts of Mississippi.

Why did not the appellant, after having been denied its petition to remove the cause to the U. S. court, appeal to the Supreme Court of Mississippi and have the supreme court pass on this matter. And if in that court the petition had been denied, would it not have had the right to have had the decision of the Supreme Court of Mississippi reviewed by the Supreme Court of the United States? We answer that it would. The appellant had the right to have filed its bill in the chancery court of Mississippi, and enjoined the collection of the judgment obtained in the Supreme Court of Mississippi, and from an adverse ruling it could have had the question submitted by appeal to the Supreme Court of the United States. But appellant refused to pursue either of these remedies, and sought the direct aid of the United States court to enjoin the judgment of appellee, which was regular and fair and free from any and all fraud.

How could the appellee be guilty of fraud in fact or law in obtaining his judgment in the State courts when the State courts passed on this very contract, Exhibit "B," and held that it was void? According to the law of Mississippi, it would have been a fraud on the rights of the appellee to have held this contract, Exhibit "B," a valid, binding contract. And after this decision by the State courts, for the United States courts to hold that appellee obtained his judgment fraudulently would be in effect to say that the State courts were equally guilty with appellee in committing this

fraud. The State courts held that appellee was not guilty of fraud in obtaining this judgment, and we respectfully insist that the matter could not be reopened by the United States courts, as it would be a violation of the comity of courts, and in this case at bar, where the injunctive relief of the United States courts is asked, would be a violation of the Revised Statutes, as heretofore quoted.

It is true the decree of the district judge in this cause recites that the judgment was obtained by fraud, as violating the provisions of Exhibit "B," but this holding by the trial judge is clearly a misapprehension of the legal effects of appellee's action, and is not a finding of facts based on any proven facts. Appellee, in instituting his suit against the railroad company, in the State courts and in obtaining his judgments was simply exercising a legal right given him under the laws of Mississippi, and as a sequence, there could be no wrong in availing himself of his legal rights.

The district court did not decide that the injunction was maintainable for the purpose of upholding the jurisdiction of the Federal courts, but simply and alone for the reason that the court thought appellee had obtained his judgment in the State courts by violating his contract and therefore committing a fraud. So we do not consider that this exception to the application of section 720, Revised Statutes, is involved. But we say that since the bill is primarily for injunctive relief, which can not be upheld, then there was no equity in the bill, and therefore no jurisdiction to be maintained.

D.

The appellant voluntarily sought the jurisdiction of the State courts in the case of Appellee vs. The Railroad Co.. but did not exhaust its remedies by appeal, and is therefore estopped or has waived its right to maintain its present suit in the United States court.

The record in this cause further shows that the Circuit Court of Monroe County, Miss., first obtained and acquired jurisdiction of the litigation. That on the 14th March, 1910, the appellant filed a petition to be made a party defendant to the suit of Appellant *vs.* Railroad Co., alleging that it was the real party in interest, and asking that the cause be removed to the Federal court. On the hearing of this motion by the circuit court it was overruled and the petition disallowed, and from this decision of the said court of Monroe County, Miss., the appellant did not appeal to the Supreme Court of Mississippi, but abandoned further proceedings in the State court and then filed its present bill in the United States district court. See admission of counsel for appellee on page 71 of record, in paragraph 3 thereof.

We submit that this action on the part of the appellant constitutes a waiver of its rights or estops the appellant from then proceeding to institute the present suit in the United States courts. First, because the appellant should have exhausted all remedies given to a litigant in the State courts before it could ask redress in the Federal courts. And appellant was denied its motion by the circuit court of Monroe County, Miss.; it had the legal right to appeal from this decision to the State Supreme court and then if that court denied its appeal, to go by writ of error to the United States Supreme court. The Circuit court of Monroe County, Miss., acquired jurisdiction of the litigation by virtue of the

motion and petition of the appellant, and also by virtue of the motion of the railroad company to make the appellant a party, and having done so, had the right to hold its jurisdiction, to the exclusion of the Federal court, until its duty was fully performed and the jurisdiction involved was exhausted.

As was said by Justice Shiras in the case of Harkreader *vs.* Wadley, 172 U. S., page 148:

> "When a State court and a court of the United States may each take jurisdiction of a matter the tribunal where jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed and its jurisdiction is exhausted."

See also Freeman *vs.* Howe, 24th Howard (U. S.), page 450; Buck *vs.* Colbath, 3rd Wallace, 334; Taylor *vs.* Taintor, 16th Wallace, 366.

The appellant in its motion of 14th March, 1910, to be made a party in the suit of Appellee *vs.* The Railroad Co. alleges in its petition that it desires to be made a party defendant in that suit for the purpose "to defend said suit, and that as the railroad company had refused to remove the said suit to the Federal court the petitioner, appellee, desired to remove the same." Again in this petition the appellant asserted that it was a defendant in the suit of Appellee *vs.* The Railroad Co., and that said cause at that time was pending undecided. Under the decisions of the State of Mississippi, when a party comes into court and into a litigated court, by motion for any purpose, and especially when asking to be made a party to the litigation, it is an appearance, and the State court acquires jurisdiction of the party so making the motion.

Thus by its motion the appellant, having voluntarily come into the Circuit Court of Monroe County, Miss., and it, through its astute counsel, alleging in its petition that

it was a defendant in the Circuit Court of Monroe County in the case of The Appellee *vs.* The Railroad Co., which as a matter of fact was true, then it follows, the appellant could not legally abandon the State courts without having exhausted the jurisdiction of the said courts by appeal, and if denied by that court what appellant thought were its rights, it could have settled its rights by appeal to the Supreme Court of the United States. We respectfully submit that the appellant could have sought the injunctive relief and could have obtained it in the proper State court, to wit, the Chancery Court of Monroe County, Miss., an injunction restraining the prosecution of the case of Appellee *vs.* The Railroad Co., and thus would have obviated the conflict of jurisdiction between the United States and the State courts, and would not now be seeking to violate the fundamental laws and statutes of Mississippi and the United States. And we respectfully submit that since the appellant sought the jurisdiction of the State courts, that this was the sole and only remedy left, first either to appeal to the Supreme court of Mississippi or to have filed its bill in the chancery court of Mississippi.

IV.

CONCLUSION.

We respectfully submit in conclusion that the circuit court of appeals was correct in reversing the cause and ordering the bill dismissed and the injunction dissolved, for the following reasons:

1st. The trial court erred in not sustaining the motion of appellee to dismiss the bills as amended, and dissolve the injunction, for the reason that the messenger's contract, Exhibit "B" to the amended bills, was void and unenforce-

able, as violating section 5 of the act of Congress, April 22nd, 1908, chapter 149, 35th Statutes at Large, page 65 and amendments; that this act applies to and protects employees of express companies injured while handling interstate commerce, when said express companies are engaged as common carriers of interstate commerce by railroad. And that the appellant and the railroad company, under its contract, Exhibit "A" to the bills, are partners or co-proprietors engaged as common carriers of interstate commerce by railroad, and appellee was a joint employee of both, and can therefore plead that the messenger's agreement, Exhibit "B," is void as violating the employers' liability act.

2nd. The trial court erred in overruling the appellee's motion to dismiss the cause, and erred in allowing the Wells Fargo & Co. to amend the bills, after the reversal and remanding of this cause and after the circuit court of appeals had declined to allow the appellant to amend the bills, since the decree in the circuit court of appeals was a final decree and Wells Fargo & Co. took no appeal from this decree nor did Wells Fargo & Co. appeal from the overruling of its motion by the circuit court of appeals.

3rd. The district court erred in not dismissing the amended bills and dissolving the injunction, because that court was without jurisdiction of the cause; since the amended bills prayed for an injunction as the primary object of the action, an injunction to restrain the appellee from collecting a judgment obtained in the supreme court of Mississippi, which relief as prayed for would in effect be contrary to the comity of courts existing between the United States and the State of Mississippi courts, and would be violative of section 720, R. S., and of section 265, chapter 11, of the judiciary act of March 3, 1911.

4th. The district court erred in not dismissing the amended bills and dissolving the injunction, because the

appellant voluntarily sought the jurisdiction of the Mississippi courts in the case of the Appellee *vs.* The R. R. Co., and then did not exhaust its remedies by appeal, and is therefore estopped or has waived its rights to file the suit in the United States district court.

Respectfully submitted,

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